No. 01-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

BARBARA KRAFT
BEINS, AXELROD & KRAFT
1717 Massachusetts Ave., NW
Suite 704
Washington, DC 20036
(202) 328-7222

Counsel for Anthony P. Santoro Respondent

KENNETH M. JOHNSON
TUGGLE DUGGINS & MESCHAN, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, NC 27402
(336) 378-1431

Counsel for George Thomas DeBarr, Respondent

WILLIAM F. HANRAHAN
Counsel of Record
LONIE A. HASSEL
GROOM LAW GROUP, CHTD.
1701 Pennsylvania Ave., NW
Suite 1200
Washington, DC 20006
(202) 857-0620

Counsel for Robert A. Scardelletti, Trustee, et al., Respondents

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QUESTION PRESENTED

The question presented is whether an unnamed class member whose motion to intervene was properly denied as untimely has standing to appeal from an order approving the settlement of a class action.

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

This defendant class action involves a defined benefit pension plan (the "plan") maintained by the Transportation Communications International Union (the "TCU" or the "union") for the benefit of the employees of the union. In late 1990, the then-serving senior officers of the union, who also served as the trustees of the plan and were participants in the plan, procured the approval by the union's governing body of a plan amendment that provided for massive increases in benefits keyed to increases in the Consumer Price Index. Pet. App. A4. In recommending this cost of living adjustment ("COLA"), the plan's trustees assured the union's governing body that the plan's actuary had conducted a thorough actuarial study that confirmed that the COLA benefits could

be adopted without increasing TCU's contributions to the plan. Based on this advice, the TCU's governing body, known as the Executive Council, adopted, effective January 1, 1991, an amendment (the "COLA amendment") providing for retrospective and prospective increases of up to 10% for each three year period following a participant's retirement. *Scardelletti v. Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498, *6-7 (D. Md. Sept. 8, 1997).

The officer-trustees who recommended the adoption of the COLA amendment then retired. Two years later, newly elected officers of the union discovered that the COLA amendment had resulted in a 50% increase in the plan's liabilities for benefits and would require massive contribution increases that would rapidly lead to the union's bankruptcy. *Id.* at *8. The newly elected officers also discovered that the former trustees' recommendation of the adoption of the COLA amendment was not supported by any actuarial study. In fact, the plan's then-serving actuary had consistently advised against the adoption of far more modest COLA provisions because the cost of funding such increases was "prohibitive." *Id.* at *22.

Realizing that funding the COLA benefit would bankrupt the union, TCU adopted a series of amendments to reduce funding costs. Principally, the TCU cut the benefit accrual rate in half for active employees and increased the normal retirement age by two years. C.A. App. 2550-51. TCU believed, however, that it could not attack the COLA amendment directly because it appeared that the benefits granted by the COLA amendment were "accrued" benefits that could not be reduced by a voluntary plan amendment. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1).[1] Consequently,

[1] "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in § 302(c)(8) or 4281." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). ERISA unhelpfully defines the term "accrued benefit" to mean "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age . . ." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). What benefits fall within this tautological definition and are therefore protected by section 204(g)'s anticutback rule has been the subject of much litigation that has produced no clear answer. *See, e.g., Bellas v. CBS, Inc.*, 221 F.3d 517, 526-28 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001).

even the drastic cutbacks in future benefit accruals, which fell entirely on the shoulders of active employees, were not sufficient to lower the plan's overall funding requirements to a level that the union could support. C.A. App. 2549-50.

The currently serving trustees of the plan then brought an action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et. seq.*, against the former trustees for breach of fiduciary duty. The United States District Court for the District of Maryland granted partial summary judgment in favor of the current trustees, concluding that the former trustees had breached their duties under section 404 of ERISA, 29 U.S.C. § 1104, by recommending the adoption of the COLA amendment without conducting any serious inquiry into the costs of funding this benefit increase. The court then set the question of damages for trial.

A crucial issue on summary judgment in the action against the former trustees was whether the COLA amendment could be repealed by a subsequent amendment. The district court ruled that at least for persons who retired before the COLA amendment took effect, the COLA benefit was not an accrued benefit and therefore could be eliminated by a plan amendment without violating ERISA's anticutback provision. Pet. App. A6.

Guided by the court's interlocutory ruling, the TCU's Executive Council immediately adopted an amendment to the plan to eliminate the COLA for pre-1991 retirees, but left the

COLA amendment in place for persons who had continued to work after 1990. These post-COLA amendment active employees appeared, under the district court's reasoning, to have a protected accrued benefit under the COLA amendment because they performed work after receiving an explicit promise that they would earn the COLA benefit. Pre-1991 retirees, in contrast, had never had such a promise while they were working. *Scardelletti v. Bobo*, 1997 U.S. Dist. LEXIS 14498, *32-33.

This benefit reduction, made in response to an interlocutory order of the court, raised the prospect of multiple lawsuits by disappointed retirees challenging the validity of the COLA elimination amendment. The plan's trustees therefore filed this action seeking a declaration that the amendment eliminating the COLA was binding on the pre-1991 retirees and a declaration that the original COLA amendment was void as to all participants in the plan because it was procured by a fiduciary breach. The trustees named petitioner Robert J. Devlin, a retiree, and George Thomas DeBarr, an active employee, as defendants and representatives of a class consisting of all participants in the plan.

The trustees named Devlin as a class representative because since September 1995, he had been prosecuting a putative class action against TCU and the trustees in the Southern District of New York that, among other claims, challenged the propriety of the trustees' efforts to eliminate the COLA amendment in their fiduciary breach action against the former trustees. *Devlin v. Transportation Communications International Union*, No. 95 CIV 10838 (S.D.N.Y. 1995).[2] However, contrary to his allegations in the New York

[2] The Southern District of New York eventually dismissed this action and Devlin appealed. The United States Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's COLA-related claim and remanded another, unrelated claim for further proceedings. Noting the District of Maryland's lengthy involvement in the present litigation, the Second Circuit observed that "[i]t seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue . . ." *Devlin v. Transportation Communications International Union*, 175 F.3d 121, 132 (2d Cir. 1999).

action, Devlin represented to the Maryland court that he was incapable of representing the class because he did not have the resources or the desire to do so. C.A. App. 539, 554-56. The Maryland court acknowledged that Devlin was a "natural defendant in the action here," who had been selected by the trustees "for reasons which nobody can ever call collusive." The court was concerned, however, that Devlin might not be able to provide vigorous representation on behalf of the class. C.A. App. 556. The trustees therefore agreed to dismiss Devlin as a defendant and name a new representative for retired participants to provide the "vigorous representation on these issues" that the court expected. C.A. App. 556-57.

The trustees named a new defendant to represent the retired segment of the class. On February 9, 1999, the court entered a conditional order certifying a class and dividing the class into two subclasses. Pet. App. A7.

Because the relevant facts had been fully developed in the preceding action against the former trustees, the parties to the present action were able to engage in informed settlement discussions at a relatively early stage. These settlement discussions eventually reached impasse, and the court appointed a magistrate judge to supervise further discussions. Throughout the course of settlement negotiations, Devlin communicated extensively with counsel for the retiree subclass and received periodic reports on the status of negotiations and the terms under discussion. Devlin repeatedly expressed his objections to any idea of settlement, and advanced specific criticisms of the terms of various proposals and the manner in which the retiree subclass counsel was conducting herself. C.A. App. 525-35.

On April 13, 1999, the Second Circuit issued its decision affirming the dismissal of Devlin's COLA-related claim in the New York action. *Devlin v. Transportation Communications International Union,* 175 F.3d 121. One week later, Devlin advised the District of Maryland by letter of his intention to file a motion to intervene in the Maryland action. C.A. App. 469. A few weeks later he submitted a second letter again stating his intention to intervene. C.A. App. 731. He took no further action for the next four months. Pet. App. A8.

In May 1999, the parties reached a settlement. On August 27, 1999, the plan's trustees moved for preliminary approval of the settlement, approval of a notice to the class, and for the scheduling of a fairness hearing. Pet. App. A8

On September 10, 1999, Devlin finally acted on his plan to intervene and filed a motion generally objecting to any preliminary approval of the settlement and seeking leave to intervene as a party. Pet. App. A8-9. On September 14, 1999, the district court gave preliminary approval to the settlement and authorized the mailing of the notice to the approximately 700 class members. The district court reserved a ruling on Devlin's motion to intervene until the fairness hearing on November 12, 1999.

At the hearing, the court denied the motion to intervene as "absolutely untimely" and denied a series of additional motions that Devlin had filed the morning of the hearing. Pet. App. A9. The court then heard Devlin's objections to the settlement and considered 23 other written objections, 22 of which echoed Devlin's stated views that the settlement was unfair to retirees. The other members of the 700-member class voiced no objection to the settlement. At the conclusion of the hearing, the court expressed its views on the terms of the settlement and stated that it would approve the settlement. As the court summed it up, "the bottom line is that this settlement not only is extremely fair, it is a testament to

the best of the best of what the law profession with the assistance of other professions can achieve. . . . And so this settlement is in my judgment . . . supremely fair and . . . I have absolutely no hesitancy in approving [it]." C.A. App. 2676-77.

Under the terms of the settlement, the COLA amendment was declared void from its inception as to all plan participants. In exchange, most retirees were promised that their benefits would be increased by 10.5%. For active employees, the benefit accrual rate, which had been cut in half once the COLA problem came to light, would be restored to its original level. Their normal retirement age, however, would remain at the higher age that had been imposed as part of the cost-cutting effort. TCU also promised that it would continue to fund the plan at a rate that the parties expected would be well in excess of ERISA's statutory minimum funding requirements. The settlement also provides that none of these benefit improvements will take place until all challenges to the approval of the settlement have been resolved. C.A. App. 1827-35.

Devlin appealed the denial of his motion to intervene and the approval of the settlement agreement to the United States Court of Appeals for the Fourth Circuit.[3] Agreeing with the district court, the court of appeals first observed that "[w]e cannot conclude, under any standard of timeliness, that the

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[3] Devlin also appealed a separate order entered under the All Writs Act, 28 U.S.C. § 1651, restraining him and others acting in concert with him from pursuing a collateral attack on the settlement that he and four other retirees filed in the United States District Court for the Southern District of New York. Although the court of appeals rejected most of Devlin's arguments concerning the All Writs injunction, it agreed with him that Rule 65 applies to such injunctions and that the district court failed to reduce its reasons for issuing the injunction to writing, as required by the Rule. The court of appeals therefore remanded the All Writs injunction to the trial court for "further clarification." Pet. App. A29.

district court abused its discretion in concluding that Devlin's motion [to intervene] was untimely." Pet. App. A11. The court of appeals pointed to Devlin's 1995 lawsuit in the Southern District of New York opposing the efforts to eliminate the COLA, his declining to serve as a class representative in the Maryland action, and his letters to the district court months before he formally moved to intervene as demonstrating that he was fully aware, at an early stage, "that his interests might be impacted by the proposed settlement." Pet. App. A12. The court of appeals also agreed with the district court that "the threat of further delay and the prospect of complicated litigation, which, at that late date might have unraveled the settlement crafted by the parties, were sufficient bases from which to conclude that Devlin's untimely motion to intervene prejudiced the parties." Pet. App. A13.

Turning to Devlin's appeal from the order approving the settlement, the panel divided. The panel majority focused on his standing as an unnamed objecting member of the class to appeal on the merits. After surveying the decisions in the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits holding that an unnamed class member does not have standing to appeal,[4] and the decisions in the Second, Third, and Ninth Circuits holding that an unnamed class member does have standing to appeal,[5] the panel majority joined the majority of circuits and ruled that an unnamed class member does not

[4] *Cook v. Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994); *Felzen v. Andreas*, 134 F.3d 873, 874-75 (7th Cir. 1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999); *Gottlieb v. Wiles*, 11 F.3d 1004, 1008-09 (10th Cir. 1993); *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987).

[5] *In re PaineWebber Inc. Ltd. Partnerships Litigation*, 94 F.3d 49, 53 (2d Cir. 1996); *Carlough v. Amchem Prods.*, 5 F.3d 707, 710 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977).

have standing to appeal from an order approving the settlement of a class action. Pet. App. A15-17. The court majority made it clear that where an unnamed class member unsuccessfully moves to intervene, the class member can simultaneously appeal both the denial of intervention and the approval of the settlement. If the appellate court then concludes that the denial of intervention was error, it can proceed directly to the merits issues concerning the settlement. "We believe that [the Sixth Circuit's] approach best balances the need to protect non-named class members against a wrongful denial of intervention below and the need to prevent nonmeritorious or untimely motions for intervention from unduly interfering with or delaying class settlement." Pet. App. A22.

In so ruling, the court focused on "the practical policy considerations of Federal Rule of Civil Procedure 23" and the detrimental effect on the class action process of allowing unnamed class members to fragment the control of class actions by appealing without any examination of their ability to fairly represent the class. Pet. App. A16 n.12. In the court's view, the competing concerns for the efficient management of class actions and for individual fairness are best balanced by requiring class members who might wish to appeal from a settlement to intervene formally in the action. The intervention requirement "weighs strongly in favor of limiting the possibility that last minute 'spoilers' . . . might unduly delay class settlement on appeal." Pet. App. A21. Because the majority concluded that Devlin's motion to intervene was properly denied "under any standard of timeliness," the majority ruled that he lacked standing to appeal. The majority therefore did not issue a dispositive ruling on the merits of the approval of the settlement. Pet. App. A24 n.17.

One member of the court concurred in the judgment but disagreed with the majority's view on standing. In the con-

curring judge's view, the balance between efficiency and fairness weighed in favor of allowing unnamed class members who appear and present objections to a settlement to appeal from an order approving the settlement. Pet. App. 30-31. Moreover, in the concurring judge's view, a rule granting standing to objecting class members would not overburden the class action system, but instead would promote certain efficiencies in the process. Pet. App. A31.

Although disagreeing with the majority on the standing question, the concurring judge agreed that the district court had properly denied Devlin's motion to intervene. Pet. App. A35. But because the concurring judge believed that the court should have reached the merits of Devlin's appeal, the judge addressed the question whether the district court had properly exercised its discretion to approve the settlement. "As the majority points out, the 'district court thoroughly considered the fairness and adequacy of the settlement,' *ante* at [Pet. App. A13 n.10], giving careful consideration to Devlin's objections. . . . The [district] court concluded that Devlin's position 'was absolutely destructive of everybody's rights and interests' and would 'steer the ship onto the rocks.' A review of the record of the fairness proceedings reveals that the district court fully analyzed the proposed settlement for fairness and adequacy . . . The district court's decision to approve the settlement was well within its discretion." Pet. App. A35 (internal citation omitted). Consequently, the concurring judge concurred in the court's judgment.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S RESOLUTION OF THE STANDING ISSUE WOULD NOT AFFECT THE FINAL OUTCOME IN THIS CASE. THE COURT SHOULD NOT EXPEND ITS RESOURCES ON A QUESTION OF NO PRACTICAL IMPORTANCE TO THE LITIGANTS.

This Court has repeatedly observed that it does not sit to render advisory opinions on abstract questions of law. *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 123 (1994) (". . . as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants."); *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here . . . can await a day when the issue is posed less abstractly."); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.").

The majority and concurring opinions below leave no real doubt that should this Court grant review and conclude that unnamed class members have standing to appeal from an order approving a class action settlement, the ruling would have no practical effect on the final disposition of this controversy. The concurring judge was quite explicit: the district court was well within its discretion in approving this settlement. Pet. App. A35. The majority opinion left little doubt that if the majority had occasion to decide the merits, it would have reached the same conclusion as the concurring

judge. Indeed, the concurring judge began his discussion of the merits by quoting a passage of the majority opinion recounting the district court's careful inquiry into the merits of the settlement. Pet. App. A35.

The majority's views on the fairness and the adequacy of the settlement are not difficult to deduce. At the conclusion of its discussion of the standing issue, the majority appended a lengthy footnote addressing in some detail each of Devlin's objections to the settlement. Pet. App. A24 n.17. At the core of his objections were three propositions: (1) The COLA amendment provided an accrued benefit to all members of the class; (2) by virtue of ERISA's anticutback provision, the COLA benefits could not be eliminated by a plan amendment, except under one limited circumstance authorized by ERISA section 302(c)(8), 29 U.S.C. § 1082(c)(8); (3) TCU had not used the section 302(c)(8) procedure when it adopted the plan amendment repealing the COLA provision.

As to the first point, the majority noted that "it is at best unclear whether the 1991 COLA amendment constitutes an accrued benefit for participants such as Devlin . . ." The majority then observed that in considering whether a settlement should be approved, the district court should not turn the settlement hearing into "'a trial or rehearsal for trial,' nor should it 'reach any dispositive conclusions on the admittedly unsettled legal issues in the case.'" Pet. App. A24 n.17 (*quoting Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). Addressing the next two points, the majority noted that "[a]lthough we do not decide this issue, we note that the nullification of the 1991 Amendment was ultimately not the product of the 1997 Amendment, but rather was the product of the district court's declaration . . . . In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void." Pet. App. A24 n.17. In short, while the

majority refrained from making a dispositive ruling on the merits of Devlin's objections to the settlement, the majority made it clear that it viewed those objections as devoid of merit.

Given the clearly signaled posture of the court of appeals, it is abundantly clear that this Court should not engage in an exploration of a theoretical question of appellate jurisdiction that will have no practical impact on the final outcome of this controversy.[6]

II. THE CONFLICT AMONG THE CIRCUITS OVER AN UNNAMED CLASS MEMBER'S STANDING TO APPEAL FROM THE APPROVAL OF A SETTLEMENT IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

The courts of appeals that have addressed the issue are in general agreement on one point: the question whether an unnamed class member has standing to appeal involves striking a balance between the interests of efficient and coherent management of class actions and the interests of individual fairness to members of a class. *See* Pet.

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[6] Granting the petition would have one real practical consequence adverse to the interests of the group on whose behalf Devlin purports to speak. The benefit increases promised to retirees under the settlement, some of which will be retroactive to January 1, 1999, cannot go into effect until all proceedings are concluded and the district court's judgment is no longer subject to further judicial review. The more than 400 hundred members of the retiree subclass are thus being deprived of the benefits of the settlement while this case remains under review. So far, more than 40 of them have died while this matter has been pending. Similarly, some members of the active subclass have retired since the settlement was approved nearly two years ago. Their monthly benefits are being paid at a reduced level until such time as the settlement is final. The only real-world effect that review by this Court would have on the litigants is to delay their receipt of the benefits of the settlement.

App. 14-18. Ordinarily, these kinds of questions, which frequently arise in connection with intervention motions and class certification decisions, are addressed by the district courts on a case by case basis guided by general principles that can be tailored to the facts of the particular case. The district courts are thus able to conduct their important litigation management functions in a flexible fashion with an eye toward both efficiency and justice.

Unusually, the balancing of efficiency and fairness presented in the opinion below arises in the rarified air of appellate jurisdiction. And although the question presented goes to the jurisdiction of the appellate courts, at bottom it is nothing more than a question concerning case management. In the six circuits that now require unnamed class members to seek leave in the district court to intervene in order to perfect their right to appeal from the approval of a settlement, the circuits have made a judgment that the district courts can perform a valuable screening function to protect the class and the court system "by limiting the possibility that last-minute 'spoilers' . . . might unduly delay class settlement on appeal." Pet. App. A21. Three circuits have struck a different balance, and assign the screening function to themselves, expressed through their decisions on the merits of the class member's appeal.

Two things are apparent from this state of affairs. First, in none of the circuit courts is an unnamed class member absolutely foreclosed from appealing a decision that may adversely affect the class member's interests. In the majority circuits, an unnamed class member who has colorable grounds "to usurp the role of the class representatives," Pet. App. A21, need only assume the relatively minor burden of filing a timely intervention motion. If the district court erroneously denies intervention, the appellate court can correct the error and address the merits. In the minority circuits, the unnamed class member is relieved of this burden,

but must still convince the appellate court that his concerns warrant reversal of the order approving settlement. But in all nine of these circuits, any unnamed class member with a meritorious point has an opportunity to persuade the courts that his contentions merit relief.

Second, the question of standing to appeal ultimately involves nothing more than whether the appellate courts will undertake the obligation of managing the appellate aspects of class action litigation by themselves, or whether they will assign part of that function to the district courts. Like nearly all litigation management questions, this one benefits from the opportunity to experiment with different approaches and gain a perspective on the best way to deal with the issue. It may be the case, as the concurring judge below believed, that there is no evidence that "objector appeals have gummed up the works in the circuits (the Second, Third, and Ninth) where they are expressly allowed." Pet. App. A32. If that is true, the minority rule may do no substantial harm.

The experience of the Seventh Circuit suggests otherwise. The Seventh Circuit was an early adopter of the rule that an unnamed class member has standing to appeal. *Research Corporation v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (7th Cir. 1970). However, the court moved away from this position in stages, first deciding that an unnamed class member did not have standing to appeal from a post-settlement order implementing the settlement, *In re VMS Ltd. Partnership Securities Lit.*, 976 F.2d 362, 368 (7th Cir. 1992), and then deciding that an unnamed class member must intervene to have standing to appeal from an order approving a settlement. *In re Brand Name Prescription Drugs Antitrust Lit.*, 115 F.3d 456, 458 (7th Cir. 1997) ("Any contrary implication of *Research Corp v. Asgrow Seed Co.* . . . can no longer be considered authoritative in light of *VMS*.") (internal citation omitted).

More recently, the Seventh Circuit has addressed the standards that should apply to an unnamed class member's motion to intervene to perfect standing to appeal from an order approving a settlement. The court began with the proposition that "[o]nly when the class members suspect that the representative is not acting in their best interests is there a need to intervene. . . . Unnamed members of the class *rarely* will suspect a shortfall in the adequacy of representation before learning of the terms of a (potentially inadequate) settlement . . ." *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 880-81 (7th Cir. 2000) (emphasis added). Consequently, "[a]s a rule the time for unnamed members of the class to intervene can not commence until notice under Rule 23 . . ." *Id.* at 881. With these principles in mind, the court readily reversed an order denying intervention as untimely where the unnamed class members did not have sufficiently timely notice that the settlement would impact their interests to allow them to intervene at an earlier stage of the litigation. *Id.*; *In re Synthroid Marketing Litigation*, 264 F.3d 712, 715 (7th Cir. 2001) (same).

Petitioner appears to suggest that the rule adopted by the majority opinion below somehow completely forecloses an unnamed class member from appealing a class settlement. "The Fourth Circuit, by contrast, held that petitioner could not appeal either as an intervenor or as an objector." Pet. 13. In fact, however, the rule actually adopted by the majority merely illustrates the efficacy of allowing the district court to screen unnamed class members' efforts to position themselves to appeal. Here, Devlin had been aware since 1995, when he brought his first action in the Southern District of New York designed to preserve the COLA amendment, of his interest in and his objections to the subject matter of the present litigation. Certainly, his interest was crystallized when he was named in 1997 as a class representative in this action. After he was dismissed as a party at his own insistence, he kept himself informed of the progress of the

litigation and of the status of settlement talks by continually communicating with counsel for the retiree subclass. Then, months before the parties reached a settlement, he twice announced his intention to intervene but took no action until a signed settlement agreement was on file. As the majority described it, "Devlin sat on the sidelines while the class settlement was crafted, despite knowing for months that his interests were at stake." Pet. App. A23. There is small wonder that all members of the court below agreed that his motion to intervene was "absolutely untimely," especially when their review of his objections to the settlement failed to find any merit whatsoever to his opposition to the settlement.

Much of the information about Devlin's maneuvers became a matter of record in this litigation only because he filed a motion to intervene, which the district court was obliged to address on the merits and the court of appeals was required to review. In those circuits following the minority rule that an unnamed class member has standing to appeal as a matter of right, the court of appeals would have been less well informed of the circumstances underlying Devlin's objections, and consequently less able to evaluate those objections. The facts of this particular case aptly illustrate the wisdom of assigning a screening function to the district courts to assist in the management of the appellate aspects of class action settlements.

As the Seventh Circuit's developing jurisprudence on unnamed class member standing to appeal demonstrates, the circuit courts are fully capable of assessing their experience with this rule of case management and adjusting their views as necessary. The circuit split on this point is simply an opportunity for the courts to measure the practical utility of differing approaches. For litigants, the only important consideration is knowing which rule will apply in their cases. No fundamental rights are endangered by either the majority or minority rules. Meritorious appeals will receive full

consideration under either rule. Unmeritorious appeals, like the present one, will be rejected under either rule. But it is extremely doubtful that even in those circuits that require intervention as a precondition to appellate standing, the courts of appeals will routinely uphold denials of motions to intervene while bemoaning their inability to address meritorious objections to flawed settlements.

The question of class action case management of the appellate dockets presented here is best left to the circuit courts to resolve in light of their developing experience. The circuit split on the point is not one that this Court needs to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BARBARA KRAFT
BEINS, AXELROD & KRAFT
1717 Massachusetts Ave., NW
Suite 704
Washington, DC 20036
(202) 328-7222

Counsel for Anthony P. Santoro Respondent

KENNETH M. JOHNSON
TUGGLE DUGGINS & MESCHAN, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, NC 27402
(336) 378-1431

Counsel for George Thomas DeBarr, Respondent

WILLIAM F. HANRAHAN
Counsel of Record
LONIE A. HASSEL
GROOM LAW GROUP, CHTD.
1701 Pennsylvania Ave., NW
Suite 1200
Washington, DC 20006
(202) 857-0620

Counsel for Robert A. Scardelletti, Trustee, et al., Respondents

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